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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT SEATTLE

8 MICHAEL JAMES MCCOLLUGH,

9 Plaintiff,

10 v.

11 NANCY A. BERRYHILL, Acting  
Commissioner of Social Security

12 Defendant.

CASE NO. C17-1537 BAT

**ORDER AFFIRMING THE  
COMMISSIONER AND DISMISSING  
THE CASE**

13 Plaintiff, Michael James McCollugh, appeals the ALJ's decision finding him not  
14 disabled. The ALJ found plaintiff's severe impairments are osteoarthritis; history of varicose  
15 veins; lumbar and cervical degenerative disc disease; left shoulder arthritis and degenerative joint  
16 disease of the left knee; that plaintiff retains the RFC to perform light work subject to additional  
17 non-exertional and mental limitations; and that plaintiff cannot perform past relevant work but is  
18 not disabled because he can perform other work in the national economy. Tr. 22-31. The ALJ's  
19 decision is the Commissioner's final decision because the Appeals Council denied review. Tr. 1.

20 Plaintiff contends the ALJ erred at step two, and also improperly rejected the opinions of  
21 Aye Lwin, M.D., and plaintiff's testimony. As discussed below, the Court **AFFIRMS** the  
22 Commissioner's final decision and **DISMISSES** the matter with prejudice.  
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## DISCUSSION

### A. The ALJ's Step Two Findings

Plaintiff contends the ALJ erred at step two in two respects. He first argues the ALJ erred in finding there is “no record of medically determinable acute process causing shoulder pain.” Dkt. 8 at 4. At step two, plaintiff bears the burden of showing (1) he has a medically determinable impairment or combination of impairments and (2) the impairment or combination of impairments is severe. *See Bowen v. Yuckert*, 482 U.S. 137, 146 (1987); 20 C.F.R. § 404.1520(c), 416.920(c). Plaintiff fails to meet this burden. An impairment is medically determinable only if it results from anatomical, physiological, or psychological abnormalities which can be shown by medically acceptable clinical and laboratory diagnostic techniques. 20 C.F.R. § 404.1508. Here, because plaintiff points to no such evidence, the Court rejects plaintiff's argument and affirms the ALJ finding that shoulder pain is a nonsevere impairment.

Second, plaintiff argues the ALJ erred in failing to find retroperitoneal lymphadenopathy is a severe impairment. Dkt. 8 at 4-6. The ALJ found the condition is medically determinable but nonsevere on the grounds there is no evidence it continues to affect plaintiff or his ability to work, and no evidence of “any ongoing and/or aggressive treatment for this condition.” Tr. 23. The ALJ further noted the record indicates retroperitoneal lymphadenopathy is of “uncertain significance” in regards to plaintiff's abdominal pain and vomiting, i.e. implying there is insufficient evidence the condition causes abdominal pain and vomiting. *Id.*

The record shows plaintiff was treated numerous time for vomiting and abdominal pain, and thus received ongoing treatment. *See e.g.* Tr. 358-367, 395-401, 434, 511-532, 640-654, 674-177. The symptoms reported were significant and would have more than a minimal impact on plaintiff's ability to work. *See e.g.* Tr. 676 (“present with abdominal pain, nausea, and vomiting

1 over the past hour. Patient states his symptoms started abruptly.”). However, no doctor opined  
2 plaintiff’s abdominal pain and vomiting is caused by retroperitoneal lymphadenopathy. Because  
3 the medical record fails to tie the condition to the symptoms, plaintiff has failed to meet his step  
4 two burden of showing the condition is “severe.” The Court notes and rejects plaintiff’s  
5 argument that retroperitoneal lymphadenopathy “could have been the cause of the abdominal  
6 pain” plaintiff suffered. Dkt 8 at 6. As discussed above, there is no evidence of record  
7 supporting the argument; plaintiff’s argument instead relies upon extra-record research counsel  
8 performed which is not a basis upon which the Court may rely to reverse the ALJ’s decision. The  
9 Court accordingly affirms the ALJ’s step two determinations.

10 **B. The ALJ’s Assessment of Dr. Lwin’s Opinions**

11 The ALJ rejected Dr. Lwin’s opinions on the grounds the doctor’s opinions are  
12 unsupported by the medical evidence of record. Tr. 28. The ALJ found the medical evidence,  
13 including Dr. Lwin’s treatment notes do not support the doctor’s opinions. Tr. 29. In specific,  
14 the ALJ found physical examinations performed on plaintiff do not support the doctor’s  
15 opinions; that plaintiff “has not been seen with regard to his arthritis; that when plaintiff was  
16 seen for abdominal pain he did not mention any back pain; that a February 2016 examination  
17 showed no deformity, normal range of motion, no tenderness and normal gait; and that in March  
18 2016 plaintiff was observed with normal range of motion in the neck, his back was “clinically  
19 straight,” there was “no spinous process tenderness to palpitation, no focal atrophy to the  
20 extremities and muscle mass was normal.” Tr. 29.

21 Plaintiff argues the ALJ erred in rejecting Dr. Lwin’s opinions for two reasons. He first  
22 argues Dr. Lwin is a treating doctor and “is likely basing his opinion in part on his personal  
23 observations.” Dkt. 8 at 7. The argument fails. Plaintiff bears the burden to show the ALJ

1 harmfully erred and has not met that burden. *See Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir.  
2 2012). Plaintiff fails to directly challenge the ALJ’s findings, i.e., that the medical record  
3 contradicts the limitations assessed by Dr. Lwin. He does not contest the findings or show they  
4 are unsupported by substantial evidence. An ALJ may properly reject a treating physician’s  
5 opinion that is inconsistent with the record and not supported by objective evidence. *See Meanel*  
6 *v. Apfel*, 172 F.3d 1111, 1113-14 (9th Cir. 1999). That is what the ALJ properly did here.

7       Plaintiff next argues the ALJ failed to consider imaging results showing disc space  
8 attenuation, endplate deformity, and degenerative mild dextrocurvature of the spine” and that  
9 the imaging demonstrates disc issues which can cause back pain, and affect ability to sit, stand  
10 and walk which the ALJ did not consider. *Id.* at 9. The argument is belied by the record. The  
11 record shows the ALJ considered the imaging results because he found plaintiff has lumbar and  
12 cervical degenerative disc disease, the condition is a severe impairment, Tr. 23, and that the  
13 condition would support “some limitations in the claimant’s ability to work,” but not to the  
14 extent plaintiff claims. Tr. 29. Hence, this is not a case in which the ALJ overlooked medical  
15 evidence establishing a condition that impaired plaintiff. To the contrary, the ALJ considered the  
16 very condition—back problems—plaintiff claims he did not. The Court thus rejects the argument  
17 the ALJ failed to consider the imaging results. In terms of the ALJ’s consideration of the  
18 imaging results, Plaintiff fails to show the ALJ erroneously evaluated the results and also fails  
19 to show the ALJ’s determination that Dr. Lwen’s opinions are inconsistent with the medical  
20 evidence is not supported by substantial evidence. The Court accordingly affirms the ALJ’s  
21 assessment of Dr. Lwen’s opinions.

1 **C. The ALJ's Evaluation of Plaintiff's Testimony**

2 Plaintiff contends the ALJ erred by rejecting his testimony. Dkt. 8 at 9-11. Newly revised  
3 Social Security Ruling ("SSR") 16-3p, 2017 WL 5180304, at \*13, provides guidance on how  
4 adjudicators should evaluate a claimant's statements. SSR 16-3p is applicable to the ALJ's  
5 decision issued September 8, 2016, as adjudicators will apply SSR 16-3p in making decisions on  
6 or after March 28, 2016. 82 Fed. Reg. 49, 468. SSR 16-3p eliminates the use of the term  
7 "credibility" and instead focuses on an evidence-based analysis of the administrative record to  
8 determine whether the nature, intensity, frequency, or severity of an individual's symptoms  
9 impact his or her ability to work. SSR 16-3p does not, however, alter the standards by which  
10 courts will evaluate an ALJ's reasons for discounting a claimant's testimony. To reject subjective  
11 complaints, an ALJ must provide "specific, cogent reasons" and, absent affirmative evidence of  
12 malingering, must reject a claimant's testimony for "clear and convincing" reasons. *Morgan v.*  
13 *Commissioner of SSA*, 169 F.3d 595, 599 (9th Cir. 1999); *see Carmickle v. Commissioner, SSA*,  
14 533 F.3d 1155, 1160 (9th Cir. 2008).<sup>1</sup>

15 Here, the ALJ rejected plaintiff's testimony as inconsistent with activities of daily living  
16 and with the medical evidence. Plaintiff does not contest the ALJ's finding that his testimony is  
17 inconsistent with "treatment notes" and that "physical examinations failed to illustrate significant  
18 problems." Tr. 27. This is a valid basis to discount a claimant's testimony recognized under SSR  
19 163-p, *see* 2017 WL 5180304, at \*8, and Circuit law, *see Smolen v. Chater*, 80 F.3d 1273, 1284  
20 (9th Cir. 1996) (ALJ may consider inconsistencies between claimant's testimony and medical  
21 evidence.). Because plaintiff fails to challenge the ALJ's determination the Court affirms the  
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23 <sup>1</sup> In *Carmickle*, the Ninth Circuit rejected the proposition that there had to be a specific *finding* of  
malingering; rather, it was sufficient that there be *affirmative evidence* suggesting malingering.  
*See Carmickle*, 533 F.3d at 1160 n.1.

1 ALJ's determination to discount plaintiff's testimony. Because the ALJ gave a valid reason to  
2 discount plaintiff's testimony, the Court need not address the other reason the ALJ gave. Even if  
3 the Court assumed the ALJ erred in relying on the other reason, the error would be harmless. *See*  
4 *Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008) (including an  
5 erroneous reason among other reasons to discount a claimant's credibility does not negate the  
6 validity of the overall credibility determination and is at most harmless error where an ALJ  
7 provides other reasons that are supported by substantial evidence).

8 **D. Step Five Findings**

9 Plaintiff argues because the ALJ misevaluated the evidence, the ALJ's step five findings  
10 are erroneous. The argument is foreclosed as the Court has rejected each of plaintiff's assigned  
11 errors and instead affirmed the determinations challenged by plaintiff.

12 **CONCLUSION**

13 The Court **AFFIRMS** the Commissioner's final decision and **DISMISSES** the matter  
14 with prejudice.

15 Dated this 5<sup>th</sup> day of June, 2018.

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18 BRIAN A. TSUCHIDA  
19 Chief United States Magistrate Judge  
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